No. 14795

IN THE

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

ERNEST EVERETT,

Appellee.

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

HON. SAM M. DRIVER, *Judge*

REPLY BRIEF OF APPELLANT

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APPELLEE'S AUTHORITIES

Appellant discusses the authorities cited in the Brief of Appellee insofar as the same bear, or fail to bear, on the three issues that were submitted for jury determination; namely:

(a) Failure to give the statutory crossing signals;

(b) Failure to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking;

(c) Last clear chance.

(Appellant's Opening Brief, page 4) (Tr. 517, 518).

Appellant first discusses the cases cited from the Supreme Court of the State of Washington.

> *Atkins v. Churchill,* 30 Wn. (2d) 859, 194 P. (2d) 364.

This case was cited in the Appellant's Opening Brief in support of its Specification of Error No. 4 and has no bearing on the three issues above referred to.

> *Delsman v. Bertotti,* 200 Wn. 380, 93 P. (2d) 371.

This case was cited in Appellant's Opening Brief as authority for the proposition that the application of the Last Clear Chance doctrine is a question of law to be determined by the Trial Court. This case is not authority for submission to the jury of any of the three issues above outlined.

> *Leftridge v. Seattle,* 130 Wn. 541, 228 P. 302.

This case is also cited in Appellant's Opening Brief. In that case, the Supreme Court of the State of Washington reversed a judgment and order of the Superior Court upon granting a non-suit and striking interrogatories in an action in tort. So far as the doctrine of Last Clear Chance is concerned, the Supreme Court held that the complaint stated

a cause of action under the doctrine of Last Clear Chance.

> *Sadler v. Northern Pacific Railway Company,* 118 Wn. 121, 203 P. 10.

This case is also cited in Appellant's Opening Brief. It is unanswerable authority for the proposition that the driver of the truck was guilty of contributory negligence as a matter of law even though the statute concerning the giving of crossing signals was not fully complied with.

> *Sasse v. Hale Morton Taxi & Auto Co.,* 139 Wn. 359, 246 P. 940.

Appellant quotes syllabus (1):

> "In an action for wrongful death of a child, run over by a taxicab driver, error cannot be assigned upon an instruction as to the last clear chance to avoid the accident, where there is no possible question as to the facts on which it was based."

The following quoted portion of the opinion at once establishes the factual difference from the case at bar:

> The street, running northerly and southerly, was paved twenty-four feet between the curbs. At the point in question, it has considerable down grade towards the north. The child and two girl companions were walking southerly up the hill, along the sidewalk on the easterly side of

the street, bouncing a ball. The taxicab driver was going northery down the hill. From a distance of more than two hundred feet, he observed the children approaching, bouncing the ball on the sidewalk, which is flush with the curb on that side of the street. There was no other traffic on the street. A car was parked against the right-hand curb, according to the driver's testimony about midway between him and the children, when he first saw them. The ball bounded out on the street, rolled across it to the west and down the hill towards the north, the direction the taxicab was being driven. Marjorie ran after the ball. The taxicab driver, travelling down the hill at a speed of from thirty to forty miles an hour, took the thread of the street to pass the parked auto and continued that course until, an appreciable distance beyond the parked car, estimated by some of the witnesses thirty or forty feet, he veered to the left and ran over the girl at, near, or on the curb on the west side of the street, at a point about sixty feet from where he left the thread of the street; and after striking the child, the taxicab continued on over the sidewalk down an embankment on to private property, on the west side of the west sidewalk. The speed limit for automobiles at the point in question was twenty miles an hour, under both the state law and an ordinance of the city.

"(1) The jury was instructed in effect that, if they found the child was negligent, it would not defeat the right of the father to recover, if such negligence had terminated before she was struck by the taxicab, or had culminated in a situation from which she could not avoid injury by the exercise of ordinary care without the cooperation and care on the part of the driver, and that

> the driver, by keeping a vigilant lookout, could have seen her danger in time to have avoided injury by the exercise of reasonable care on his part by stopping his car, changing his course, or taking other reasonable precautions warranted by the circumstances, and that he negligently failed to keep such lookout or to exercise such care. This instrction is complained of. Whether the instruction as given is abstractly correct or not under the circumstances, it can not be said to have possibly prejudiced the rights of the appellants, in view of the fact that the taxicab driver did actually see the girl's peril prior to, and up to, the time of the injury, and in view of the further fact that there was credible disinterested testimony to the effect that the child had run clear across the street to the gutter, run along it as though she were after a ball, picked up something, stood up, screamed and was struck." (Pages 360, 361.)

Scholz v. Leuer, 7 Wn. (2d) 76, 109 P. (2d) 294.

The principal question involved in that case was whether or not the deceased girl came within the provisions of the host-guest statute of the State of Washington. None of the issues above stated were involved in that decision.

Scott v. Pacific Power & Light Company, 178 Wn. 647, 35 P. (2d) 749.

There is not the slightest factual similarity between the cited case and the base at bar. We quote syllabus (1), page 647:

"(1) ELECTRICITY (5) — INJURIES INCIDENT TO PRODUCTION OR USE — DEFECTS, ACTS, OR OMISSIONS CAUSING INJURY — EVIDENCE — SUFFICIENCY. An electric company maintaining a high voltage wire in proximity to the side or roof of a building, where persons in the pursuit of business are liable to come in contact with it, must exercise the highest degree of care to avoid injury; and a company's negligence is a question for the jury were it maintained an uninsulated high tension wire carrying sixty-six hundred volts, within ten to twenty inches from the side of the building and extending twenty-four to thirty inches higher than the edge of the coping on the roof, which supported iron poles used for advertising purposes."

Skeels v. Davidson, 18 Wn. (2d) 358, 139 P. (2d) 301.

Appellant assumes that this case is cited as authority for the proposition that the damages awarded to appellee were not excessive. The case was an action for malpractice. Consequently, none of the three issues above referred to were involved.

It will thus be observed that Appellee has not cited a single case from the State of Washington involving a crossing collision which justified the Trial Court in submitting to the jury the three issues above enumerated.

Appellant now discusses the cases cited by Appellee from other jurisdictions.

> *Bank of America National Trust & Savings Assn. v. Commissioner of Internal Revenue,* 126 F. (2d) 48 (Ninth Circuit).
>
> *Western National Insurance Co. v. LeClare,* 163 F. (2d) 337 (Ninth Circuit).
>
> *United States v. Gallagher,* 151 F. (2d) 556 (Ninth Circuit).

These cases deal with the question involving appellate procedure and in no wise touch the three issues above referred to.

> *Cashatt v. Brown,* 211 North Carolina 367, 190 S. E. 480.

The factual distinction between the cited case and the case at bar is shown by Syllabus 1:

> "In action against railroad for death caused by train striking deceased's automobile, evidence that deceased was riding about five miles per hour over the railroad crossing, and because of thick underbrush could not see approaching train which gave no warning of its approach, that because of lack of ballast on track deceased's automobile stalled on the track *held* sufficient to take the question of negligence and proximate cause to the jury since the railroad must maintain the crossing in a safe condition."

A reading that case discloses that the defective

condition of the crossing caused the vehicle to stall. There is an utter absence of evidence in the case at bar that the condition of Appellant's crossing caused the truck to stall.

> *Moore v. Atlantic Line Railroad Co.,* 201 North Carolina 26, 158 S. E. 556.

Counsel for Appellee characterizes this decision as being "a case in point." The evidence of plaintiff in that case showed that when 60 or 70 feet from the crossing, the driver of the truck stopped, looked and listened and saw no approaching train; that within seven or eight feet, he stopped, looked and listened and saw no train, though his vision up the track was one-third of a mile. The evidence for the plaintiff further disclosed that the driver and occupant of the truck were strangers to the crossing in question.

> *Cunningham v. Thompson,* 277 S. W. (2d) 602 (Mo.).

This case involved the application of the humanitarian doctrine, which is in effect in Missouri, but never applied in the State of Washington. Appellee's counsel quotes a portion of an unfinished sentence lifted from that decision on page 610 thereof (Appellee's Brief, page 11).

> "In this case defendant's employees testified they did not see plaintiff approach the crossing. Of course, the jury was not obliged to believe the employees' testimony . . ."

The unfinished portion of the sentence reads as follows:

> "that they could not see plaintiff's approach because of steam and smoke; and the resultant inference would be that they were not looking. Now the fact, as such, that the employees were not looking was immaterial as tending to prove any essential element of a humanitarian rule case; but Instruction No. 1 (and Instruction No. 2) is so framed as to make such fact, if inferred, a causative factor in these humanitarian submissions."

A judgment in favor of the plaintiff based upon a verdict of the jury in the cited case was reversed by the Supreme Court of Missouri because of error in instructions involving allegations of primary negligence on the part of the defendant and also the submission of the humanitarian doctrine.

Appellee places great, if not complete, reliance upon the speed tape (defendant's Exhibit 36) as justification for the submission of the doctrine of last clear chance. On page 7 of Appellee's Brief is found this statement:

> "When sixty miles per hour was reached, the

acceleration was arrested by a service application of the brakes, and the speed of sixty miles per hour was maintained for one-half mile. At that time, which was one-half mile, or two thousand six hundred forty feet, west of the O'Neill crossing, the service application was released, *the train accelerated to sixty-four miles per hour and maintained that speed undiminished by any type of braking—service, emergency or otherwise*—(italics supplied) to the point of impact with the truck, immediately after which the speed started dropping off to zero miles per hour, and stopped at a distance of about one-fourth of a mile from the crossing."

There is no reference to any portion of the Transcript of Record justifying the italicized portion of Appellee's statement. It would seem to be asserted that no brake application of any kind or character was made in a distance of 2640 feet west of the crossing and not until the point of impact. If this be true, it is a clear distortion of the testimony of defendant's expert, Joseph Gaynor. He testified as follows:

"Q. Now, does that exhibit indicate anything about whether brakes were or were not applied?

(Testimony of Joseph F. N. Gaynor.)

"A. It does, it shows what they were speaking about here at some point. Well, you can take it from here (indicating), the speed is going on up here, but instead of going up and reaching 64 at a point up here—

"Q. When you say 'a point up here,' what are you pointing to?

"A. Well, it would reach 64 miles an hour, to reach—I will call that terminal speed, because that is the maximum speed it made—it would have reached terminal speed over here, say a quarter of a mile farther than it did if a brake application had not been made to hold that acceleration down, and it was a service application because it only changed the slope of the curve slightly. Then at this point (indicating) it shows that an emergency braking began. (515)

"Q. When you say 'at this point,' where is that with reference—

"A. That point is right on that crossing, on mile post 4:75, retardation begins and it stops at mile post 5, about a quarter of a mile beyond the crossing.

"Q. In other words, it began really to take hold at that point, is that what you mean?

"A. It *took hold* at the crossing, yes, sir."

(Italics supplied.) (Tr. page 440, 441, Vol. 2.)

Again in the Transcript, the same witness testified as follows:

"Q. Have you an opinion as to what the average reaction time is of the average engineer in making an emergency stop such as was made under the conditions here existing?

"A. Yes.

Mr. Etter: I think that is all right.

"A. I have timed many of my own men.

"Q. (By Mr. McKevitt): Well, what is the average reaction time?

"A. Average time for a man to go after that brake valve, that is, just the motion of going for it, and tripping it, is just about a second, and I put a stop watch on to check them. (525.)

"Q. Then after he throws that lever into full emergency, is there anything else that could have been done on that date to stop that train?

"A. Not a thing.

"Q. Now, what other element or lag is there?

"A. There is a lag known as the braking lag, equipment lag.

"Q. Explain that to the Court and jury.

"A. Equipment lag, the brake system is a series of charged-up cylinders charged up from the train line or brake pipe, and in making an emergency application, the air that is in this brake pipe has to be gotten rid of first, and as it does, then the triple valves on the cars or control valves move to let the stored air under each car as auxiliary reservation go into the brake cylinder and push it out against the wheel.

"Q. And in order to get full braking application, do you have to get it on every wheel on the engine and on every car?

"A. That's right.

"Q. And on the number of wheels shown on these diagrams that are in here, isn't that true? Your answer is yes?

"A. Yes.

"Q. What is that time element?

"A. That time element by actual stop watch test will run (526) from three to three and a half seconds.

"Q. In other words, do I understand you to mean by that that after the full application is made and before you got full application, three to three and a half seconds elapses?

"A. Yes, sir, whatever speed the train is doing, it will proceed for about three to three and a half seconds before braking becomes effective." (Tr. 449, 450, 451.)

We now quote from page 12 of Appellee's Brief:

"In the case at hand the jury was in no way obligated to believe all that to which Scobee (Engineer) testified. They could well have believed that he did see the approach of the truck and did make a service application of the brakes, as he so testified. They could likewise have believed that he was mistaken in his estimate of his position when he saw the girl and made the application.

"They could have rejected his testimony that he was at that moment nine hundred to one thou-

sand feet away from the crossing and *accepted the testimony of the speed tape which placed him at that moment, a mile away from the crossing.* (Italics supplied.) The jury may have believed Scobee when he said he watched the truck and when it paused or stopped at the crossing he released the service application of the brake, and, by the same token believed the speed tape when it placed the train two thousand six hundred forty feet away from the crossing at the instant the service application of braking was released. If such were the facts accepted by the jury, it it would make no real difference whether the girl saw the train, couldn't see the train or was oblivious to the train (possibilities which the death of the girl bars us now from ever knowing), since in any event she would have had ample time to get across the track had she not stalled thereon. It seems apparent that reasonable minds could find a total lack of contributory negligence in the act of attempting to drive a panel truck across a railroad track with a train approaching one-half mile away."

Appellee does not attempt to place the position of the truck when the train was one mile from the crossing. Is it to be inferred that the truck was stalled on the crossing with the train five thousand two hundred eighty feet distant therefrom? If this be so, then she must have remained in the truck for nearly a full minute before she attempted to escape therefrom. As pointed out in Appellent's Opening Brief, the engineer testified under examination by Appellee's

counsel that when he first saw the truck it was twenty-five feet from the crossing (Tr. 253). While counsel has drawn certain conclusions from the speed tape, they have not attempted to estimate the time this girl remained in the truck after it had stalled upon the crossing and with an approaching train in plain view. How long was this truck stalled on the track under Appellee's theory — sixty seconds? Fifty? Forty? Thirty? Perhaps counsel will enlighten the Court on these questions in oral argument. If she remained in that truck in an attempt to get it off the crossing for any of the periods of time above referred to, then the doctrine of last clear chance could have no application. Support for this proposition is found in one of the cases cited in Appellee's Brief *Moore v. Atlantic Coast Line Railroad Co.* (supra). At page 558, paragraphs 10 and 11 of that decision, is found this language:

> "If he and his father closed their eyes to existing conditions, as if hoodwinked or blinded, and negligently awaited results, the recovery of damages should be denied, because in that event their negligence, concurring with that of defendant to the last moment, would eliminate the doctrine of defendant's last clear chance."

This is but another way of saying that where plaintiff and defendant have an equal opportunity of

avoiding a collision, the doctrine of last clear chance does not apply. Citation of authority for such an obvious proposition is hardly necessary. Of course, the assumption, if such it be, that the truck was stalled on the crossing for any of the periods of time above mentioned, or for any period of time in excess of that testified to by the engineer and the fireman, is in no wise supported by direct testimony, nor are there any facts in the record from which the legitimate inference can be drawn that it was stalled on the crossing for any period of time in excess of that testified to by the engineer and fireman. Appellant again re-emphasizes the undeniable fact pointed out in its Opening Brief that the only eye witnesses to the approach of this truck to the crossing and the conduct of its driver were the engineer and the fireman.

CONCLUSION

In conclusion, Appellant respectfully submits that the judgment of the District Court entered upon the verdict of the jury should be reversed and the action dismissed. This, for the following reasons:

(1) There is no evidence of a substantial character or probative value that the condition of the crossing was a proximate cause of the accident.

(2) There is no evidence of a substantial character or probative value that the failure to give the full statutory crossing whistle was a proximate cause of the accident.

(3) The doctrine of last clear chance is not applicable for the reason that the evidence failed to disclose that the driver of the truck was in a position of inescapable peril or that she was oblivious to it. (*Deere v. Southern Pacific Co.,* 123 Fed. (2d) 438) (Ninth Circuit). (Appellant's Opening Brief, page 57.)

Respectfully submitted,

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